

Reprint

Supreme Court, U. S.
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MICHAEL RUDAN, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1704

MARTIN R. HOFFMANN, SECRETARY OF THE ARMY,
Appellant

—v.—

LOUIS J. FIOTO, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT FILED MAY 24, 1976
PROBABLE JURISDICTION NOTED OCTOBER 4, 1976

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—v.—

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

No. 75-44—Civ.—Bruchhausen, Bramwell, Lumbard

RELEVANT DOCKET ENTRIES

Date	PROCEEDINGS
1975	
Jan. 10	COMPLAINT
Feb. 5	Plaintiff's interrogatories.
Mar. 12	ANSWER
April 2	Defendant's answers to interrogatories.
May 10	Second interrogatories to defendants.
June 6	Notice of motion for an order declaring above a class action.
July 15	Before BRUCHHAUSEN, J.—Motion for convening a three judge court granted on consent. Motion determining that this action be maintained as a class action—deferred to the three judge court.
July 16	Memorandum in response to plaintiff's motion re Rule 23.
July 22	By BRUCHHAUSEN, J.—Memorandum and Order dated 7-18-75 granting motion to convene a three judge court.
November 5	Copy of Order of Irving R. Kauffman for designation of Judges.
November 10	By BRUCHHAUSEN, J.—MEMORANDUM & ORDER dated 11-10-75 setting 12-15-75 as the trial date.
November 26	By BRUCHHAUSEN, J.—Memorandum dated 11-26-75 directing the plaintiff's attorney and the defendant's attorney to forward certain documents to Judges Bramwell and Lumbard.

Date	PROCEEDINGS
December 5	Defendant's notice of motion for an order granting judgment on pleadings filed with Memorandum in support.
December 5	Notice of motion for class action certification, summary judgment, and permanent injunction filed with Memorandum in support.
December 12	Memorandum in opposition to defendants' motion for judgment on the pleadings.
December 15	Before BRUCHHAUSEN, BRAMWELL, & LUMBARD—Case called for hearing on motions for summary judgment. Motions argued. Decision reserved.
1976	
January 12	By BRUCHHAUSEN, J.—Memorandum and Order dated 1-12-76 granting class action certification.
January 14	By LUMBARD, USCJ; BRUCHHAUSEN, USDJ; BRAMWELL, USDJ—Opinion dated 1-14-76 granting Fioto's motion for summary judgment, direct that he henceforth be placed on the Army's retirement rolls, and order that he immediately receive any and all retirement benefits which have accrued since his honorable discharge and which have been unlawfully denied him as a result of the Army's erroneous ruling. We also direct the Secretary to place all others in Fioto's class on the Army's retirement rolls and grant them requirement benefits accordingly. The defendant's cross-motion for summary judgment is correspondingly denied. So ordered
January 26	AMENDMENT to opinion dated 1-14-76. (LUMBARD, CIR. J; BRUCHHAUSEN, J, BRAMWELL, J.)
January 26	JUDGMENT dated 1-23-76 granting plaintiffs' motion for summary judgment. (Approved by LUMBARD, BRUCHHAUSEN & BRAMWELL)

Date	PROCEEDINGS
February 10	Amended notice of motion for an order pursuant to Rule 62.
February 3	Affidavit of D. Goldfarb in Opposition to defendants' motion to stay judgment.
February 3	Memorandum in Opposition to Defendants' Motion for a Stay of Judgment.
February 18	BRUCHHAUSEN, J. and BRAMWELL, J.—Order dated 2-17-76 granting motion to stay the judgment of this court with respect to members of the class.
February 25	NOTICE OF APPEAL.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No. 75 C 44

LOUIS J. FIOTO, on behalf of himself and all other persons
similarly situated, PLAINTIFFS

—against—

UNITED STATES DEPARTMENT OF THE ARMY;
HOWARD CALLAWAY, AS SECRETARY OF THE ARMY,
DEFENDANTS

COMPLAINT

PRELIMINARY STATEMENT

1. By this proceeding plaintiff, on behalf of himself and all others similarly situated, seeks a judgment declaring unconstitutional 10 USC § 1331(c) on its face and as applied as violative of plaintiff's constitutional right to equal protection; plaintiff, on behalf of himself and all others similarly situated, seeks a judgment enjoining defendants from applying 10 USC § 1331(c) to plaintiff or his class; and plaintiff, on behalf of himself and all others similarly situated, seeks a judgment directing defendants to grant them retirement benefits pursuant to 10 USC § 1331(a).

2. 10 USC 1331(c) reads as follows:

(c) No person who, before August 16, 1945, was a Reserve of an armed force, or a member of the Army without component or other category covered by section 1332(a)(1) of this title except a regular component, is eligible for retired pay under this chapter, unless he performed active duty after April 5, 1917, and before November 12, 1918, or after September 8, 1940, and before January 1, 1947, or unless he performed active duty (other than for

training) after June 26, 1950, and before July 28, 1953. Aug. 10, 1956, c. 1041, 70A Stat. 102; Aug. 21, 1958, Pub.L. 85-704, 72 Stat. 702; Sept. 2, 1956, Pub.L. 85-861, § 33(a)(8), 72 Stat. 1564.

3. Specifically plaintiff qualifies for retirement benefits pursuant to 10 USC 1331(a) with twenty years of service after August 16, 1945. Plaintiff also served in the Reserve from January 11, 1933 to September 25, 1940; thus plaintiff has been disqualified from all retirement benefits pursuant to 10 USC 1331(c).

4. This is a proper case for the convening of a three judge court pursuant to 28 USC §§ 2282 and 2284, in that plaintiff herein seeks an injunction to restrain the defendants from the enforcement, operation and execution of an Act of Congress on the ground that said Act is repugnant to the United States Constitution.

JURISDICTION

5. Jurisdiction over this suit is conferred upon this court by 28 USC § 1361 as an action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to plaintiffs; 28 USC § 1331(a), as a controversy arising under the Constitution or laws of the United States where the amount involved exceeds \$10,000; 5 USC § 702, as a proceeding to review agency action which adversely affects or aggrieves a person within the meaning of a relevant statute; 28 USC § 1343(4), as an action to recover damages or secure equitable relief under an Act of Congress providing for the protection of civil rights.

6. The amount in controversy exclusive of interest and costs exceeds the sum of \$10,000.00.

7. Plaintiff raises questions of violation of his constitutional rights, in that the Army has denied him equal protection under the law in denying him retirement benefits and treating him differently from other servicemen solely because he served additional time beyond the required 20 years in inactive reserve.

CLASS ACTION ALLEGATIONS

8. Plaintiff brings this action as a class action pursuant to Rule 23(a) and, in addition Rule 23(b)(2) or in the alternative Rule 23(b)(1)(A) or (B) of the Federal Rules of Civil Procedure.

9. This class is composed of persons at least 60 years of age who have performed 20 years of service computed under 10 USC § 1332 since August 16, 1945 and otherwise are entitled to Retired Pay for Non-Regular Military Service, except that before August 16, 1945 they were a Reserve of an armed force or a member of the Army without component and did not perform active duty after April 5, 1917 but before November 12, 1918, or after September 8, 1940 and before January 1, 1947 or after June 26, 1950 and before July 28, 1953, and therefore were disqualified from Retired Pay Benefits by virtue of 10 USC § 1331(c).

10. The class is so numerous that joinder of all members is impracticable. Plaintiff cannot state the exact number of persons in the class, but the information is possessed by or available to defendants. (Rule 23(a)(1)).

11. There are questions of law and fact common to the class, that is, whether the statute on its face and as applied to plaintiff and his class is constitutional. (Rule 23(a)(2)).

12. Plaintiff's claim is typical of the claims of the class. (Rule 23(a)(3)).

13. Plaintiff's attorney have legal resources and experience adequate to protect all members of the class and plaintiff will fairly and adequately protect the interests of the class. (Rule 23(a)(4)).

14. In refusing plaintiff's application for Retired Pay Benefits, defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the class as a whole. (Rule 23(b)(2)).

15. The prosecution of separate actions by individual members of the class would create a risk of varying adjudications with respect to individual members of the

class which might establish incompatible standards of conduct for the defendants in this action and would create a risk of adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests. (Rule 23(b)(1)(A) and (B)).

DEFENDANTS

16. Defendant HOWARD CALLOWAY is the Secretary of the Army who has ultimate authority and control over plaintiff's retirement pay benefits. Pursuant to 10 USC § 1331(b) application for retired pay would be made to the Secretary of the Army. The United States Army is the branch of the armed services in which plaintiff last served.

PLAINTIFF LOUIS J. FIOTO

17. Plaintiff LOUIS J. FIOTO is presently retired from service in the United States Army. He was born December 9, 1907. Plaintiff served in the United States Coast Guard from 1927 to 1941. He served in the Army National Guard from 1933 to 1940 and again from 1947 to 1967. He received an Honorable Discharge on December 9, 1967 having reached the mandatory age of 60. (Exhibit 1).

18. Plaintiff met all requirements for Retired Pay for Non-Regular Service pursuant to 10 USC § 1331(a).

19. Plaintiff on September 5, 1967 filed an application for Retired Pay Benefits. (Exhibit 2).

20. On or about January 15, 1970 plaintiff received notice from the Department of the Army stating that pursuant to Title 10, United States Code, Chapter 67: "A further requirement of the law is that a person who was a member of the Reserve component before 16 August 1945 must have served on active duty during some portion of World War I (5 April 1917 to 12 November 1918), or World War II (8 September 1940 to 1 January

1947) or active duty other than for training during the Korean War (26 June 1950 to 28 July 1953). By law, only active Federal service performed under competent military orders may be created as active duty for retired pay purposes." (Exhibit 3). Plaintiff was further informed that since his entire service was performed with the National Guard and he did not serve on extended duty during a war-time period, he is not eligible for retired pay under 10 USC § 1331(c).

21. On February 21, 1974, a law assistant with the Legal Aid Society wrote the Commanding General of the New York National Guard requesting again retired pay benefits for plaintiff. In that letter 10 USC § 1331(c) was cited and it was noted that plaintiff served two terms, one from January 11, 1933 to September 25, 1940, a second from October 27, 1947 to December 9, 1967. This second term in and of itself entitled plaintiff to retired pay benefits since it began after 1945 and continued for a full 20 years. (Exhibit 4).

22. By letter dated April 2, 1974, the Legal Aid Society was notified that plaintiff's application for retired pay must be made to the Secretary of the Army. (Exhibit 5).

23. On May 28, 1974, David Goldfarb, Esq., an attorney with The Legal Aid Society, wrote the Secretary of the Army stating that the Society represented plaintiff, and requesting retired pay benefits be granted. (Exhibit 6).

24. By letter dated June 18, 1974, the Department of the Army, Office of the Adjutant General informed Mr. Goldfarb that, "[d]eviation from the law to allow Mr. Fioto to be granted retirement pay on the basis of his service subsequent to 16 August 1945 when he was in fact, a member of a Reserve component from 11 January 1933 to 25 September 1940 and has not fulfilled the war service requirement of the law for entitlement to pay is not authorized." (Exhibit 7).

25. On June 26, 1974 plaintiff filed an "Application for Correction of Military or Naval Record Under the Provisions of Title 10, U.S. Code, Sec. 1552." (Exhibit 8). A memorandum was also submitted.

26. By letter dated September 25, 1974 The Army Board for Correction of Military Records denied plaintiff's application. (Exhibit 9).

27. Petitioner has now exhausted all administrative remedies and there is no further appeal he can take within the Department of the Army.

STATEMENT OF CLAIM

28. 10 USC 1331(c) on its face and as applied to plaintiff and members of his class, and defendant's policies, practices and procedures pursuant thereto violate equal protection principles of the Due Process Clause of the Fifth Amendment because plaintiff and others similarly situated are singled out and denied retired pay benefits that would be given to others with the same twenty years of service after 1945, because plaintiff also served in the Reserve before 1945. Such discrimination is without rational or compelling jurisdiction. Plaintiff, and others similarly situated, who were old enough to serve before 1945, and did so, are being denied benefits that younger men, who could not and did not serve in that period, freely receive.

RELIEF REQUESTED

WHEREFORE, plaintiff on behalf of himself and all others similarly situated, respectfully asks that this Court:

1. Assume jurisdiction of this cause and convene a three judge court pursuant to 28 USC §§ 2282 and 2284.
2. Determine by order, pursuant to Rule 23(c) (1) of the Federal Rules of Civil Procedure, that this action be maintained as a class action.
3. Pursuant to 28 USC §§ 2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure, enter a judgment declaring 10 USC § 1331(c) unconstitutional on its face and as applied to plaintiff and his class.
4. Enter a permanent injunction restraining the defendants, their officers, agents, servants, employees and successors in office from applying 10 USC § 1331(c).

5. Enter an order directing defendants to grant retirement benefits to plaintiff and his class pursuant to 10 USC § 1331(a), retroactive to the date of their first eligibility.

6. Pursuant to Rule 54(d) of the Federal Rules of Civil Procedure allow plaintiffs reasonable attorneys fees and their costs and disbursements herein and also grant them and the members of their class such additional and alternative relief as may seem to this Court be just, proper and equitable.

Dated: Richmond, New York
January 7, 1975.

Respectfully submitted

/s/ Joan Mangones

/s/ David Goldfarb
JOAN MANGONES,
THE LEGAL AID SOCIETY
56 Bay Street
Staten Island, N.Y. 10301
212-273-6677
DAVID GOLDFARB, of Counsel

Honorable Discharge



from the Armed Forces of the United States of America

This is to certify that

LOUIS JOSEPH FIOTO MSG E-7 NG21916240 102d Ord Co (DS) NYARNO

was Honorably Discharged from the ARMY NATIONAL GUARD OF
NEW YORK

AND AS A RESERVE OF THE ARMY

on the 9TH *day of* DECEMBER 1967

This certificate is awarded as a testimonial of Honest and Faithful Service

THIS DISCHARGE DOES NOT RELIEVE THE INDIVIDUAL NAMED HEREIN FROM ANY RESERVE OBLIGATION TO WHICH HE
MAY BE SUBJECT UNDER THE PROVISIONS OF THE UNIVERSAL MILITARY TRAINING AND SERVICE ACT, AS AMENDED

Ralph C. Bonavist

RALPH C. BONAVIST

LTC ORD NYARNO

COMMANDING

PLACES FOR FORM IS DATED 1 JAN 66, WHICH IS OBSOLETE

100-53

BEST COPY AVAILABLE

DEPARTMENTS OF THE ARMY AND THE AIR FORCE
NATIONAL GUARD BUREAU

REPORT OF SEPARATION AND RECORD OF SERVICE IN THE ARMY NATIONAL GUARD OF NEW YORK
AND AS A RESERVE OF THE ARMY
TYPE OF DISCHARGE: **PC (HONORABLE)**
(No creases or alterations in this entry valid)

1. NAME (Last, first, middle initial) **Photo Louis J**
2. SERVICE NO **5021916210** 3. GRADE **MSO E7** 4. ARM OR SERVICE **Ordinance** 5. TERM OF ENLISTMENT **Five Years**

6. ORGANIZATION **102d Ord Co (IS) NY ANG** 7. DATE OF DISCHARGE **9 December 1967** 8. PLACE OF DISCHARGE **Brooklyn, New York**
HOME STATION **1102 8th Avenue Bklyn NY**

9. PERMANENT ADDRESS FOR MAILING PURPOSES **29 Olga Place Staten Island NY** 10. DATE OF BIRTH **9 December 1907** 11. PLACE OF BIRTH **Brooklyn, New York**

12. CIVILIAN OCCUPATION (Include name and address of present employer, or if unemployed, the last employer)
Br Auto Repairman

13. RACE **WHITE** 14. MARITAL STATUS **SINGLE** 15. U.S. CITIZEN **YES**

16. COLOR EYES **Brown** 17. COLOR HAIR **Gray** 18. HEIGHT **5 FT 5 IN** 19. WEIGHT **162 LBS** 20. NO DEPENDENTS **Two**

MILITARY HISTORY

21. DATE AND PLACE OF ENLISTMENT **MSO E-7 76710** 22. MILITARY OCCUPATIONAL SPECIALTY AND NUMBER

23. MILITARY QUALIFICATION AND DATE (i.e. Infantry, Aviation, Marksmanship Badge, etc.)
 Rifle Cal 30 M1 Exp 30 May 61
 Rifle Cal 30 M1 53 19 May 62

24. DECORATIONS, CITATIONS, MEDALS, BADGES, COMMENDATIONS, AND CAMPAIGN RIBBONS AWARDED OR AUTHORIZED
(This period of service)
None

25. PRIOR SERVICE (Branch of service, inclusive dates, and primary duty with MOS)
NAVY USCG 27 Jan 27 - 26 Jun 30 Surfman
NAVY USCG 30 Jul 30 - 30 Jul 31 SI/C
ARMY 11 Jan 33 - 7 Oct 40 1821 80T
ARMY 27 Oct 47 - 26 Nov 62 639.70 MSOT

26. LENGTH THIS SERVICE 27. TOTAL SERVICE FOR PAY PURPOSES 28. EDUCATION (Years) 29. HIGHEST GRADE BELD.

YEARS MONTHS DAYS YEARS MONTHS DAYS GRAHAMMAR HIGH SCHOOL COLLEGE
5 0 23 27 8 24 8 - - MSO E-7

30. SERVICE SCHOOLS ATTENDED AND DATES
Auto Maint Fort Dix, N.J. 11 Dec 50 to 2 Feb 51

31. REASON AND AUTHORITY FOR DISCHARGE
By to RD due to having met mandatory age 60, 9 December 1967

32. REMARKS (This space for completion of above items or entry of other items specified in MO directive)
MS Form 55 given to EM by Unit Commander

33. SIGNATURE OF PERSON BEING DISCHARGED 34. SIGNATURE OF OFFICER AUTHORIZED TO SIGN
FRANCIS J. FERRICONE CPT CDD 102d Ord Co

APPLICATION FOR RETIRED PAY SHEET
FOR INSTRUCTION

1. Submitting Office
US Army Administration Center (ATTN AGUZ-SMT-CTR)
100 Page Boulevard St Louis, Missouri 63132
2. DATE OF BIRTH **9 Dec 07** 3. RETIRED PAY TO BEGINS (Date) **1 Jan 68**

4. NAME (Last, first, middle initial) **Photo, Louis J** 5. SERVICE NUMBER **21916210**
6. ADDRESS **29 Olga Place Staten Island New York 10305** 7. PRESENT ASSIGNMENT **New York Army National Guard**

SERVICE BEFORE 1 JULY 1947

ARMED FORCE AND COMPONENT	GRADE OR RATING	FROM				TO			
		DAY	MONTH	YR	DAY	MONTH	YR		
Navy USCG	Surfman	27	Jan	27	26	Jun	30		
Navy USCG	SI/C	30	Jul	30	30	Jul	31		
Army ARNG	Sgt	11	Jan	33	7	Oct	40		
Army ARNG	MSOT	27	Oct	47	26	Nov	62		

SERVICE AFTER 30 JUNE 1947

ARMED FORCE AND COMPONENT	GRADE OR RATING	FROM				TO				RETIRED PAY TO BEGINS (Date)
		DAY	MONTH	YR	DAY	MONTH	YR			
Army ARNG	MSOT E7	27	Oct	47	26	Nov	62	15		
Army ARNG	MSOT E7	27	Oct	47	9	Dec	67	6		
		1	Jul	55	9	Jul	55	9		
		21	Jul	56	4	Aug	56	15		
		3	Aug	57	17	Aug	57	15		
		16	Aug	58	30	Aug	58	15		
		11	Jul	59	25	Jul	59	15		
		6	Aug	60	20	Aug	60	15		
		24	Jun	61	30	Jun	61	7		
		1	Jul	61	8	Jul	61	8		
		1	Sep	62	15	Sep	62	15		
		18	Jul	63	3	Aug	63	17		
		13	Aug	64	29	Aug	64	17		
		5	Jun	65	19	Jun	65	15		
		13	Aug	65	27	Aug	65	15		
		24	Jun	67	8	Jul	67	17		

19. DATE **5 Sep 67**

10D FORM 108 PREVIOUS EDITIONS OF THIS FORM ARE OBSOLETE.

EXHIBIT 2

BEST COPY AVAILABLE

EXHIBIT 3

DEPARTMENT OF THE ARMY
OFFICE OF THE ADJUTANT GENERAL
U.S. ARMY ADMINISTRATION CENTER
St. Louis, Missouri 63132

[SEAL]

IN REPLY REFER TO:
AGUZ-PAD-SRR Fioto, Louis J.
NG 21 916 240

25 Jan. 1970

Mr. Louis J. Fioto
29 Olga Place
Staten Island, NY 10305

Dear Mr. Fioto:

This is in further reference to your application for retired pay benefits.

A statement of service showing you had service in the New York National Guard from 11 January 1933 to 25 September 1940 and 27 October 1947 to 9 December 1967 has been received.

Title 10, United States Code, Chapter 67, authorizes retired pay for members and former members of the Reserve components who have attained age 60 and completed a minimum of 20 years of qualifying service. A further requirement of the law is that a person who was a member of the Reserve component before 16 August 1945 must have served on active duty during some portion of World War I (5 April 1917 to 12 November 1918), or World War II (8 September 1940 to 1 January 1947) or active duty other than for training, during the Korean War (26 June 1950 to 28 July 1953). By law, only active Federal service performed under component military orders may be credited as active duty for retired pay purposes.

Since your entire service was performed with the National Guard and you did not serve an extended duty

16

during a war-time period, you are not eligible for retired pay under the above cited law.

Sincerely,

/s/ C. A. Stanfield
C. A. STANFIELD
Colonel, AGC
Commanding

17

EXHIBIT 4

THE LEGAL AID SOCIETY
STATEN ISLAND NEIGHBORHOOD OFFICE

66 Bay Street; Staten Is., N.Y. 10301
Joan Mangones, Attorney-in-Charge
Phone (212) 273-6677

February 21, 1974

Commanding General
National Guard
Albany,
New York

Re: AGUZ-PAD-SRR *Fioto, Louis J.*
NG 21 916 240

Dear Sir:

I am hereby requesting that retired pay benefits be granted to Louis J. Fioto in consideration of his service to the New York National Guard from January 11, 1933 to September 25, 1940 and October 27, 1947 to December 9, 1967, a total of twenty-eight years.

Title 10, United States Code, Chapter 67, authorizes retired pay for members and former members of the Reserve components who have attained age 60 and completed a minimum of 20 years qualifying service. I am fully cognizant of the special requirements of § 1331(c):

No person who, before August 16, 1945, was a Reserve of an armed force; or a member of the Army component or other category covered by § 1332 (a) (1) of this title except a regular component, is eligible for retired pay under this chapter, unless he performed active duty after April 5, 1917 and before November 12, 1918 or after September 8, 1940, and before January 1, 1947 or unless her performed active duty after June 26, 1950, and before July 28, 1953.

Mr. Fioto served two independent terms in the National Guard. The first term beginning January 11, 1933 and ending September 25, 1940. The second term beginning October 27, 1947 and ending on December 9, 1967. This second term in and of itself entitled Mr. Fioto to retired pay benefits since it began after 1945 and continued for a full 20 years.

Any interpretation of § 1331(c) which would penalize Mr. Fioto for services rendered during that first term of service, in excess of the minimum requirements for retired pay benefits, would be blatantly unfair and patently discriminatory.

I further request you to consider the possibility of re-instating Mr. Fioto in the National Guard so that he might be re-employed as a National Guard Technician (M/Sgt.) for the New York State Arsenal, Shop B. I have spoken to Chief Warrant Officer Louis Colangelo, who is in charge of Shop B in Brooklyn. He is aware of Mr. Fioto's excellent physical and mental condition and informs me that he would gladly welcome the return of a worker of Mr. Fioto's caliber.

Thank you for your time and consideration in this matter.

Yours truly,
THE LEGAL AID SOCIETY

Charles Carnesi
Law Assistant

CC:mi

EXHIBIT 5

[SEAL]

STATE OF NEW YORK
DIVISION OF MILITARY AND NAVAL AFFAIRS

Public Security Building
State Campus
Albany, New York 12226

Malcolm Wilson
Governor
Commander in Chief

John C. Baker
Major General
Chief of Staff to the Governor

MNJA

2 April 1974

Mr. Charles Carnesi
Law Assistant
The Legal Aid Society
56 Bay Street
Staten Island, New York 10301

Re: Fioto, Louis J.

Dear Mr. Carnesi:

Your letter to the Commanding General has been referred to this office for reply.

As you have indicated, Title 10, United States Code, § 1331(c) spells out the requirements for retired pay for members of the Reserve Components. Any changes to this statute would require Congressional action, and cannot be altered by interpretation or otherwise at this Headquarters. It should be noted that the intent of Congress was to require active service, during a period of national emergency, in World War I or II or the Korean War, for those individuals who before 16 August 1945 were members of a Reserve Component of the Armed Forces.

This section also requires that application for retired pay must be made to the secretary of the military service concerned; in this case, the Secretary of the Army.

Mr. Fioto's records indicate that he was discharged from the Army National Guard by virtue of reaching age 60, which is also retirement age for his technician position.

Sincerely yours,

/s/ Carson Leonard
CARSON LEONARD
LTC, JAGC—RET
Assistant Legal Officer

CL/dc

EXHIBIT 6

THE LEGAL AID SOCIETY
STATEN ISLAND NEIGHBORHOOD OFFICE

56 Bay Street; Staten Is., N.Y. 10301
Joan Mangones, Attorney-in-Charge
Phone (212) 273-6677

May 28, 1974

Secretary of the Army
Pentagon
Washington, D.C.
Re: AGUZ-PAD-SRR Fioto, Louis J.
NG 21 916 240

Dear Sir:

We represent Louis J. Fioto. I am hereby requesting that retired pay benefits be granted to Louis J. Fioto in consideration for his service to the New York National Guard from January 11, 1933 to September 25, 1940 and October 27, 1947 to December 9, 1967, a total of twenty-eight years.

Title 10, United States Code, Chapter 67, authorizes retired pay for members and former members of the Reserve components who have attained age 60 and completed a minimum of 20 years qualifying service. I am fully cognizant of the special requirements of § 1331(c):

No person who, before August 16, 1945, was a Reserve of an armed force, or a member of the Army component or other category by § 1332(a)(1) of this title except a regular component, is eligible for retired pay under this chapter, unless he performed active duty after April 5, 1917 and before November 12, 1918 or after September 8, 1940, and before January 1, 1947 or unless he performed active duty after June 26, 1950, and before July 28, 1953.

Mr. Fioto served two independent terms in the National Guard. The first term beginning January 11, 1933 and ending September 25, 1940. The second term beginning October 27, 1947 and ending on December 9, 1967. This second term in and of itself entitled Mr. Fioto to retired pay benefits since it began after 1945 and continued for a full 20 years.

I am enclosing letters from Colonel Stanfield of the Department of the Army and LTC Leonard of the New York State Division of Military Affairs.

Please advise this office of your final decision regarding Mr. Fioto's retirement benefits.

Sincerely,
THE LEGAL AID SOCIETY

David Goldfarb
Staff Attorney

DG:mi

bc: John Alexander, Esq.
Legal Services for the Elderly Poor
2095 Broadway
New York, N.Y. 10023

EXHIBIT 7

DEPARTMENT OF THE ARMY
OFFICE OF THE ADJUTANT GENERAL

U.S. Army Reserve Components Personnel and
Administration Center
St. Louis, Missouri 63132

[SEAL]

IN REPLY REFER TO:

AGUZ-RAD-SI Fioto, Louis J.
21 916 240

28, Jun. 1974

Mr. David Goldfarb
Attorney at Law
The Legal Aid Society
56 Bay Street
Staten Island, NY 10301

Dear Mr. Goldfarb:

This refers to your inquiry in behalf of Mr. Louis J. Fioto requesting retired pay benefits in consideration for his service to the New York National Guard.

Deviation from the law to allow Mr. Fioto to be granted retirement pay on the basis of his service subsequent to 16 August 1945 when he was, in fact, a member of a Reserve component from 11 January 1933 to 25 September 1940 and has not fulfilled the war service requirement of the law for entitlement to pay is not authorized.

Mr. Fioto's only recourse for further appeal of his case is to the Army Board for Correction of Military Records if he believes that an injustice exists by reason of denial of entitlement to retirement pay. That Board was established by Congress and is empowered to determine the existence of an error or injustice and, if appropriate,

to correct a record to provide relief. The inclosed application form, with instruction sheet, is for his use if he wishes to apply.

Sincerely,

/s/ Robert L. Gwaltney
ROBERT L. GWALTNEY
LTC, AGC
Director, Retired Activities
Directorate

Inclosures

APPLICATION FOR CORRECTION OF MILITARY OR NAVAL RECORD UNDER THE PROVISIONS OF TITLE 10, U.S. CODE, SEC. 1552 (See instructions on reverse side BEFORE completing application.)				Form Approved Budget Bureau No. 22-2009
BRANCH OF SERVICE <input checked="" type="checkbox"/> ARMY <input type="checkbox"/> NAVY <input type="checkbox"/> AIR FORCE <input type="checkbox"/> MARINE CORPS <input type="checkbox"/> COAST GUARD				
1. NAME (Last, first, middle initial) (Please print)	2. PRESENT RATE, GRADE	3. SERVICE NUMBER	4. SOCIAL SECURITY ACCOUNT NUMBER	
FIOTO, LOUIS J.	retired MSGT E-7	NG21916240	100-01-1527	
5. TYPE OF DISCHARGE (If by court-martial, state type of court.)	6. PRESENT STATUS, IF ANY, WITH RESPECT TO THE ARMED SERVICES (Active duty, retired, reserve, etc.)	7. DATE OF DISCHARGE, OR RELEASE FROM ACTIVE DUTY		
HONORABLE	RETIRED	12/9/67		
8. ORGANIZATION AT TIME OF ALLEGED ERROR IN RECORD		9. I DESIRE TO APPEAR BEFORE THE BOARD IN WASHINGTON, D.C. (No expense to the Government.)		
RETIRED		<input type="checkbox"/> YES <input checked="" type="checkbox"/> NO		
10. NAME AND ADDRESS OF COUNSEL (If any.) DAVID GOLDFARB, ESQ., THE LEGAL AID SOCIETY, Staten Island, N.Y. 10301				
11. I REQUEST THE FOLLOWING CORRECTION OF ERROR OR INJUSTICE: A decision that I am entitled to retirement pay. Upon such decision I request payment of the money retroactive to 9/5/67 when I first applied for retired pay benefits.				
12. See other side.				
13. I BELIEVE THE RECORD TO BE IN ERROR OR UNJUST IN THE FOLLOWING PARTICULARS: I have served sufficient time subsequent to 1945 to be granted retirement pay. The fact that I performed additional service prior to 1945 should not penalize me in this respect. When there was no possibility of completing 20 years of service after 1945, the statute could not and did not contemplate the situation existing in the present case. Title 10, Chapter 67, 1552(c) was enacted in the 1950's.				
14. IN SUPPORT OF THIS APPLICATION I SUBMIT AS EVIDENCE THE FOLLOWING: (If Veterans Administration records are pertinent to your case, give Regional Office location and Claim Number.) Pertinent letters respecting my request for benefits. My service records are available to you.				
15. THE DATE OF THE DISCOVERY OF THE ALLEGED ERROR OR INJUSTICE WAS June 18, 1974. IF NOT, STATE THREE YEARS SINCE THE ALLEGED ERROR OR INJUSTICE WAS DISCOVERED, STATE WHY THE BOARD SHOULD FIND IT IN THE INTEREST OF JUSTICE TO CONSIDER THIS APPLICATION. I first requested benefits on September 6, 1967. Various correspondence has resulted since then (see attachments) resulting in final refusal on June 18, 1974.				
16. APPLICANT MUST SIGN IN THE SPACE PROVIDED. IF THE RECORD IN QUESTION IS THAT OF A PERSON WHO IS DECEASED, LEGAL PROXY OR DEATH OR INCAPACITY MUST ACCOMPANY APPLICATION. IF APPLICATION IS SIGNED BY SPOUSE, NEXT OF KIN OR LEGAL REPRESENTATIVE, INDICATE RELATIONSHIP OR STATUS IN APPROPRIATE BOX. <input type="checkbox"/> SPOUSE <input type="checkbox"/> NEXT OF KIN <input type="checkbox"/> LEGAL REPRESENTATIVE <input type="checkbox"/> OTHER (Specify)				
17. I MAKE THE FOLLOWING STATEMENTS, AS PART OF MY CLAIM, WITH FULL KNOWLEDGE OF THE PENALTIES INVOLVED FOR WILLFULLY MAKING A FALSE STATEMENT OR CLAIM. (U.S. Code, Title 18, Sec. 237, 1001, provides a penalty of not more than \$10,000 fine or not more than 5 years imprisonment or both.)				
18. COMPLETE ADDRESS, INCLUDING ZIP CODE (Applicant should forward notification of all changes of address.) 29 OLGA PLACE, STATEN ISLAND, N.Y. 10305				DOCUMENT NUMBER (DO NOT WRITE IN THESE SPACES)
19. DATE June 26, 1974				SIGNATURE (Applicant must sign here.) Louis J. Fioto

INSTRUCTIONS			
1. For detailed information see: Air Force Regulation 81-8 Army Regulations 15-185 Coast Guard Code of Federal Regulations Title 33, Part 52 Navy, NAVEXOS P-473, as revised.		2. Item 11: State the specific correction of record desired.	
2. Submit original only of this form.		3. Item 12: In order to justify correction of a military or naval record, it is necessary for you to show to the satisfaction of the Board, or it must otherwise satisfactorily appear, that the alleged entry or omission in the record was in error or unjust. Evidence may include affidavits or signed testimony of witnesses, executed under oath, and a brief of arguments supporting application. All evidence not already included in your record must be submitted by you. The responsibility for securing new evidence rests with you.	
3. Complete all items. If the question is not applicable, mark--"None".		4. Item 14: 10 U.S.C. 1552b provides that no correction may be made unless request is made within three years after the discovery of the error or injustice, but that the Board may excuse failure to file within three years after discovery if it finds it to be in the interest of justice.	
4. If space is insufficient, use "Remarks" or attach additional sheet if necessary.		5. Various veterans and service organizations furnish counsel without charge. These organizations prefer that arrangements for representation be made through local posts or chapters.	
5. Various veterans and service organizations furnish counsel without charge. These organizations prefer that arrangements for representation be made through local posts or chapters.		6. List all attachments or inclosures.	
6. List all attachments or inclosures.		7. Items 8 and 10. Personal appearance of you and your witnesses or representation by counsel is not required to insure full and impartial consideration of applications. Appearances and representations are permitted at no expense to the Government when a hearing is authorized.	
MAIL COMPLETED APPLICATIONS TO APPROPRIATE ADDRESS BELOW			
ARMY	NAVY AND MARINE CORPS	COAST GUARD	AIR FORCE
Board for Correction of Military Records Department of the Army Washington, D.C. 20310	Board for Correction of Naval Records Department of the Navy Washington, D.C. 20370	U.S. Coast Guard - ATTN: Senior Member Board for Correction of Coast Guard Records Washington, D.C. 20591	USAFMPC (AFPMDBAIB) RANDOLPH AFB TEX 76140
REMARKS			
13. I believe the record to be in error or unjust in the following particulars: I have served sufficient time subsequent to 1945 to be granted retirement pay. The fact that I performed additional service prior to 1945 should not penalize me in this respect. Title 10, Chapter 67, 1552(c) was enacted in the 1950's when there was no possibility of completing 20 years of service after 1945. Thus, the statute could not and did not contemplate the situation existing in the present case.			

EXHIBIT 8 p.2

BEST COPY AVAILABLE

EXHIBIT 9

AGUZ-SAD-CO Fioto, Louis J.
100 01 1527 23/111/4

25 Sep. 1974

MSG Louis J. Fioto, Retired
29 Olga Place
Staten Island, NY 10305

Dear Sergeant Fioto:

I refer to your application for correction of military records.

The Army Board for Correction of Military Records may deny an application if a sufficient basis for review has not been established.

After examining and considering your Army records and facts you presented, the Army Board for Correction of Military Records determined on 28 August 1974 that insufficient evidence has been presented to indicate probable material error or injustice; accordingly, your application was denied.

In the absence of new and material evidence tending to show existence of error or injustice in the military records, further consideration by the Board is not contemplated.

Your counsel has been furnished a copy of this letter.

Sincerely,

VERNE L. BOWKERS
Major General, USA
The Adjutant General

CF:

David Goldfarb, Esq.
The Legal Aid Society
56 Bay Street
Staten Island, NY 10301
CIS:PCM:iq
F.#750049

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No. 75 C 44

LOUIS J. FIOTO, on behalf of himself and all other persons
similarly situated, PLAINTIFF

—against—

UNITED STATES DEPARTMENT OF THE ARMY;
HOWARD C. CALLAWAY, as Secretary of the Army,
DEFENDANTS

ANSWER

FIRST DEFENSE

1. This court lacks subject matter jurisdiction over the plaintiff's complaint.

SECOND DEFENSE

2. Defendants admit the allegations contained in paragraphs 16, 17, 19, 20, 22, 23, 24, 25, 26 and 27 of the complaint; and deny the allegations contained in paragraphs 6, 7, 18 and 28 of the complaint.

3. The allegations contained in paragraph 1 of the complaint constitute questions of law which defendants respectfully refer to the court and characterizations of the complaint which do not require any response.

4. As to the allegations contained in paragraph 2 of the complaint, defendants respectfully refer to the court to the official text of the statute.

5. Defendants admit the allegations contained in paragraph 3 of the complaint except that defendants deny the allegation that plaintiff qualifies for retirement benefits under 10 U.S.C. § 1331(a).

6. The allegations contained in paragraphs 4, 5, 8, 9, 10, 11, 12, 13, 14, and 15 of the complaint constitute

questions of law which defendants respectfully refer to the court.

7. Defendants admit the allegations contained in paragraph 21 of the complaint except that defendants deny the allegation that plaintiff's second term in the National Guard entitled plaintiff to retired pay benefits.

WHEREFORE, defendants demand dismissal of the plaintiff's complaint, and such other and further relief as the court may deem appropriate.

Dated: Brooklyn, New York

March 11, 1975

DAVID G. TRAGER
United States Attorney
Eastern District of New York
Attorneys for Defendants
225 Cadman Plaza East
Brooklyn, New York 11201

By:

PAMELA C. MCGUIRE
Assistant U.S. Attorney

TO:

Joan Mangones, Esq.
The Legal Aid Society
56 Bay Street
Staten Island, New York 10301
Att: David Goldfarb, Esq.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No. 75 C 44

LOUIS J. FIOTO, on behalf of himself and all other persons
similarly situated, PLAINTIFFS

—against—

UNITED STATES DEPARTMENT OF THE ARMY;
HOWARD C. CALLAWAY, as Secretary of the Army,
DEFENDANTS

INTERROGATORIES TO THE UNITED STATES DE-
PARTMENT OF THE ARMY; HOWARD CALLA-
WAY AS SECRETARY OF THE ARMY

Plaintiff requests that the UNITED STATES DE-
PARTMENT OF THE ARMY, and/or HOWARD CAL-
LAWAY as SECRETARY OF THE ARMY, by an officer
or agent, who shall furnish such information as is avail-
able to said Defendants, answer the following interroga-
tories, separately and fully in writing and under oath,
pursuant to Rule 33 of the Federal Rules of Civil Pro-
cedures, and that the answers to be signed by the person
making them and be served on Plaintiff's attorney thirty
(30) days after service of these interrogatories.

In answering these interrogatories furnish all infor-
mation which is available to you, including information
in the possession of your attorneys and not merely such
information known of your own personal knowledge.

If you cannot answer the following interrogatories in
full, after exercising due diligence to secure the infor-
mation to do so, so state, and answer to the extent pos-
sible, specifying your inability to answer the remainder,
and stating whatever information or knowledge you have
concerning the unanswered portions.

1. The person or persons answering the following in-
terrogatories will each please state his name, title and
business address.

2. State the number of applicants for retirement bene-
fits pursuant to 10 USC 1331(a) received by the Depart-
ment of the Army each year from 1956 to the present.

3. State the number of persons granted retirement
benefits pursuant to 10 USC 1331(a) in each year from
1956 to the present.

4. State the number of persons denied retirement bene-
fits pursuant to the rule in 10 USC 1331(c) for each
year from 1956 to the present. List the states in which
these persons reside.

5. Of the persons in question 4 above, state the num-
ber for each year from 1965 to the present who have 20
years of service as a Reserve or otherwise after August
16, 1945. List the states in which these persons reside.

6. Of the persons in question 4 above, state the num-
ber for each year from 1973 to the present who have 20
years of service after July 28, 1953. List the states in
which these persons reside.

7. Pursuant to the application for Retired Pay Bene-
fits filed by Plaintiff LOUIS J. FIOTO on 5 September
1967 (DD Form 108) state the amount of Retired Pay

Benefits he would have been entitled to beginning 1 January 1968 if he had not been denied benefits pursuant to 10 USC 1331 (c).

Dated: Richmond, New York
February 3, 1975

YOURS &c.
JOAN MANGONES, Esq.
THE LEGAL AID SOCIETY
56 Bay Street
Staten Island, N.Y. 10301
DAVID GOLDFARB, of Counsel
Attorneys for Plaintiffs
212-273-6677

TO: United States
Department of the Army
Pentagon
Washington, D.C.

Howard Callaway
Secretary of the Army
Pentagon
Washington, D.C.

U.S. Attorney General
Washington, D.C.

U.S. Attorney General
Eastern District, New York
225 Cadman Plaza East
Brooklyn, N.Y. 11201

CIS:PCM:iq
F.#750049

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No. 75 C 44

LOUIS J. FIOTO, on behalf of himself and all other persons
similarly situated, PLAINTIFF

—against—

UNITED STATES DEPARTMENT OF THE ARMY;
HOWARD C. CALLAWAY, as Secretary of the Army,
DEFENDANTS

ANSWERS TO INTERROGATORIES

1. These interrogatories are answered by Pamela C. McGuire, Assistant United States Attorney, of counsel to David G. Trager, United States Attorney for the Eastern District of New York, attorney for defendants in the above-captioned action. The following answers are based on material supplied to the undersigned by Major K. C. Bowden, Chief Support Division, Reserve Components Personnel and Administration Center, St. Louis, Missouri, and by J. E. Boone, Deputy Director, Retired Pay Operations, United States Army Finance and Accounting Center, Indianapolis, Indiana.

2. The defendants are unable to provide the information requested in Interrogatories 2 through 6. Each application for retirement benefits pursuant to 10 U.S.C. § 1331 is processed individually. All applications, approvals and denials are filed in the individual personnel folder. No separate tabulation or accounting of the number of applicants or of the number of persons granted or denied benefits is maintained. To provide the information requested in these Interrogatories, the Reserve Components Personnel Administration Center would have to screen several million individual records. Moreover,

many of the relevant records were destroyed in the fire at the National Personnel Records Center in July 1973.

3. From January 1, 1968 until February 28, 1975, the plaintiff would have received Retired Pay Benefits in the amount of \$7,973.45 if he had been eligible for those benefits under 10 U.S.C. § 1331.

Dated: Brooklyn, New York
April 1, 1975

PAMELA C. MCGUIRE
Assistant U.S. Attorney

Sworn to before me this
1st day of April, 1975

TO:

Joan Mangones, Esq.
The Legal Aid Society
56 Bay Street
Staten Island, New York 10301

Att: David Goldfarb, Esq.
Of Counsel

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

75 C 44

July 18, 1975

LOUIS J. FIOTO, on behalf of himself and all other persons
similarly situated, PLAINTIFFS

—against—

UNITED STATES DEPARTMENT OF THE ARMY;
HOWARD C. CALLAWAY, as Secretary of the Army,
DEFENDANTS

MEMORANDUM AND ORDER

The plaintiff moves for an order pursuant to 28 U.S.C. 2282, and 2284 convening a three judge court, and for an order pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, determining this action to be maintainable as a class action.

It is conceded by the government that the constitutional question presented is substantial. Therefore, it does not object to the convening of a three judge court.

This portion of the motion is granted.

The court will defer to the three judge court the issue whether or not the cause should proceed as a class action.

It is so ordered.

Copies hereof will be forwarded to the attorneys for the parties.

/s/ Walter Bruchhausen
Senior U.S.D.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No. 75 C44

(Three Judge Court)

LOUIS J. FIOTO, on behalf of himself and all other persons
similarly situated, PLAINTIFFS

—against—

UNITED STATES DEPARTMENT OF THE ARMY;
HOWARD C. CALLAWAY, as Secretary of the Army,
DEFENDANTS

PLAINTIFF'S STATEMENT UNDER GENERAL
RULE 9(g) OF THE MATERIAL FACTS AS TO
WHICH THERE EXISTS NO GENUINE ISSUES
TO BE TRIED

1. Plaintiff LOUIS J. FIOTO is presently retired from service in the United States Army. He was born December 9, 1907. Plaintiff served in the United States Coast Guard from 1927 to 1931. He served in the Army National Guard from 1933 to 1940 and again from 1947 to 1967. He received an Honorable Discharge on December 9, 1967 having reached the mandatory age of 60.

2. Plaintiff meets the age and service requirements for Retired Pay for Non-Regular Service pursuant to 10 USC § 1331(a) in that:

- (a) he is at least 60 years of age;
- (b) he has performed at least 20 years of service computed under Title 10 § 1332;
- (c) he performed the last eight years of qualifying service while a member of a regular component, and
- (d) he is not entitled under any other provision of law, to retired pay from an armed force or retainer pay as a member of the Fleet Reserve or the Fleet Marine Corps Reserve.

3. Plaintiff performed 20 years of service computed under Title 10 § 1332 between 1947 and 1967.

4. On September 5, 1969 plaintiff filed an application for retired pay for non-regular service pursuant to 10 USC § 1331. The Army denied his application.

5. On May 28, 1974, plaintiff, by his attorney, wrote The Secretary of the Army requesting retired pay benefits be granted. The Department of the Army, Office of the Adjutant General informed plaintiff his request was denied.

6. On June 26, 1974 plaintiff filed an "Application for Correction of Military or Naval Record Under the Provisions of Title 10, U.S. Code, Sec. 1552." The Army Board for correction of military records denied plaintiff's application.

7. Plaintiff has now exhausted all administrative remedies and there is no further appeal he can take within the Department of the Army.

8. The Army's denial of plaintiff's application is based on the fact that although plaintiff meets the criteria of 10 USC § 1331(a), he does not meet the additional criteria of 10 USC § 1331(c) which provides that any person who served in the reserves or national guard before August 16, 1945, is not eligible for retired pay unless they performed active duty in World War I, World War II, or the Korean Conflict.

9. The members of the asserted class are so numerous that joinder of all members is impracticable.

Dated: Richmond, New York
December 3, 1975.

Respectfully submitted,

JOAN MANGONES, ESQ.
THE LEGAL AID SOCIETY
42 Richmond Terrace
Staten Island, N.Y. 10301
212-273-6677
DAVID GOLDFARB, of Counsel
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No. 75 C 44

[Filed in Clerk's Office, U.S. District Court E.D.
N.Y., Jan. 12, 1976]

January 12, 1976

LOUIS J. FIOTO, on behalf of himself and all other persons
similarly situated, PLAINTIFFS

—against—

UNITED STATES DEPARTMENT OF THE ARMY;
HOWARD C. CALLAWAY, as Secretary of the Army,
DEFENDANTS

MEMORANDUM AND ORDER

BRUCHHAUSEN, D. J.

In consideration of plaintiff's motion, dated June 4, 1975, for class action certification, pursuant to Rule 23 (b) (2) of the Federal Rules of Civil Procedure, it is hereby

Ordered and decreed that the plaintiff's motion is granted.

Due to the limited jurisdiction of three-judge courts, as set forth by the Supreme Court in Hagans v. Lavine, 415 U.S. 538, 543-45 (1974), the question of class action certification has been considered by this court, rather than by the three-judge court convened to hear the constitutional issues in this case. 28 U.S.C. § 2284 (5).

/s/ Walter Bruchhausen
Senior U. S. D. J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No. 75 C 44

[Filed in Clerk's Office, S. District Court,
E.D., N.Y., May 3, 1976]

LOUIS J. FIOTO, on behalf of himself and all other persons
similarly situated, PLAINTIFFS

—against—

UNITED STATES DEPARTMENT OF THE ARMY;
HOWARD C. CALLAWAY, as Secretary of the Army,
DEFENDANTS

ORDER

Defendants having moved by notice of motion dated April 21, 1967 for a stay of the judgment pending appeal to the United States Supreme Court, it is hereby ORDERED and DECREED that the motion is granted.
Dated: April 30, 1976

/s/ J. Edward Lumbard
J. EDWARD LUMBARD
U.S.D.J.

/s/ Walter Bruchhausen
WALTER BRUCHHAUSEN
U.S.D.J.

/s/ Henry Bramwell
HENRY BRAMWELL
U.S.D.J.
A True Copy
Attest
Dated May 11, 1976
LEWIS ORMEL

BY Frank [Illegible]
Deputy Clerk

CIS:JCJ:es
File No. 750049

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No. 75 C 44

LOUIS J. FIOTO, on behalf of himself and all other persons
similarly situated, PLAINTIFFS

—against—

UNITED STATES DEPARTMENT OF THE ARMY,
HOWARD C. CALLAWAY, as Secretary of the Army,
DEFENDANTS

NOTICE OF MOTION

SIR:

PLEASE TAKE NOTICE that upon the annexed affidavit of JOSEPH E. GLEASON, Director of the Retired Activities Directorate of the United States Army, the defendants will move this Court before the honorable three-judge court previously convened herein, in the United States Courthouse for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York on the 7th day of May, 1976, at 10:00 o'clock in the forenoon of that day, or at such other time and place as the Court may designate, for an order pursuant to Rule 62 of the Federal Rules of Civil Procedure staying the judgment of this Court with respect to members of the class certified herein pending defendants' direct appeal to the United States Supreme Court.

Dated: Brooklyn, New York
April 21, 1976

Yours, etc.,

DAVID G. TRAGER
United States Attorney
Eastern District of New York
Attorney for Defendants
225 Cadman Plaza East
Brooklyn, New York 11201

By: J. Christopher Jensen
J. CHRISTOPHER JENSEN
Assistant U.S. Attorney

TO:

DAVID GOLDFARB, ESQ.
Attorney for Plaintiffs
Legal Aid Society
Staten Island
Neighborhood Office
42 Richmond Terrace
Staten Island, New York 10201

SUPREME COURT OF THE UNITED STATES

No. 75-1704

MARTIN R. HOFFMANN, Secretary of the Army,
APPELLANT

v.

LOUIS J. FIOTO, ETC.

APPEAL from the United States District Court for the
Eastern District of New York.

The statement of jurisdiction in this case having been
submitted and considered by the Court, probable juris-
diction is noted.

October 4, 1976

SUPREME COURT OF THE UNITED STATES

No. 75-1704

MARTIN R. HOFFMANN, Secretary of the Army,
APPELLANT

v.

LOUIS J. FIOTO, ETC.

ON CONSIDERATION of the motion of the appellee
for leave to proceed herein in forma pauperis,

IT IS ORDERED by this Court that the said motion
be, and the same is hereby, granted.

October 4, 1976